87-1695

CASE NO.

IN THE

SUPREME COURT

OF THE

UNITED STATES

VIVIAN ALVAREZ, f/u/b/o AMERICAN HOME INSURANCE COMPANY

Petitioner

v.

MERRILL STEVENS DRY DOCK COMPANY

Respondent

PETITION FOR WRIT OF CERTIORARI

WILLIAM B. MILLIKEN, ESQ.
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QUESTION PRESENTED FOR REVIEW

ARE FLORIDA STATE COURTS FREE TO IGNORE PRECEDENTS OF THE SUPREME COURT OF THE UNITED STATES REGARDING EXCULPATORY CLAUSES IN SHIP REPAIR CONTRACTS WHERE THIS COURT HAS HELD UNEQUIVOCALLY IN BISSO V. INLAND WATERWAYS CORP., 348 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911 (1955) THAT SUCH CLAUSES ARE VOID IN A CASE IN ADMIRALTY INVOLVING CONSTRUCTION OF A MARITIME CONTRACT?

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OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the Eleventh Judicial Circuit for Dade County, Florida are printed in the Appendix at Page App. 1-20. The Opinion of the District Court of Appeal of Florida, Third District, is printed in the Appendix at Page App. 21-30. The District Court of Appeal of Florida's Denial of Petitioner's Motion for Rehearing is printed in the Appendix at Page App. 31. The Order of the Supreme Court of Florida is printed in the Appendix at Page App. 32-33.

JURISDICTION

The Opinion of the District Court of Appeal of Florida, Third District, was entered on June 23, 1987. Petitioner's motions for rehearing and rehearing en banc were denied on August 31, 1987. The Order of the Supreme Court of Florida denying review was entered on January 5, 1988. The jurisdiction of the Supreme Court of the United States is invoked under 28 USC, Section 2101 (c) and because this case presents a state appellate court's decision on an important question of federal maritime law which is in con-

flict with applicable decisions of this Court. Rule 17.1(c) Supreme Court Rules.

STATUTES INVOLVED

United States Constitution, Article III, Section 2, Clause 1. Subjects of jurisdiction.

> The judicial Power shall extend to all Cases . . .of Admiralty and Maritime Jurisdiction . . . .

STATEMENT OF THE CASE

During July, 1982, the yacht ALISON V sank at her dock. Petitioner ALVAREZ contracted with Respondent MERRILL STEVENS DRY DOCK COMPANY for repairs of the vessel and her engines. MERRILL STEVENS repaired the engines without a vital insulating blanket covering the turbo chargers. The absence of turbo charger blankets subsequently caused a fire which destroyed the vessel.

Petitioner ALVAREZ sued Respondent, MERRILL STEVENS in Dade Count (Miami) Circuit Court under the theories of negligence and breach of contract. The trial court found MERRILL STEVENS negligent and in breach of contract , but held an exculpatory clause in

the repair contract absolved MERRILL STEVENS of all liability. The controlling federal law, Bisso v. Inland Waterways Corp., 349 U.S. 85, 79 S.Ct. 629, 99 L.Ed. 911 (1955) was first raised during trial by Petitioner ALVAREZ in opposition to MERRILL STEVENS' Motion for Directed Verdict, and subsequently became the basis of the trial court's holding MERRILL STEVENS liable for damages. Upon rehearing, the trial court reversed its earlier ruling and held the exculpatory clause void. Respondent MERRILL STEVENS then appealed to the District Court of Appeal of Florida, Third District, which by majority reversed the trial court. The dissenting opinion of the Third District Court of Appeal correctly notes that the trial court in imposing liability on MERRILL STEVENS was "following firmly established principles of law." (Citing Alcoa Steamship Company v. Charles Farren and Company, 383 F.2d 46 (5th Cir. 1967),

cert. denied, 393 U.S. 836, 89 S.Ct. 111, 21 L.Ed. 2nd 107 (1968)). Petitioner then filed her Motion for Rehearing and Rehearing en Banc before the Third District, which was denied. Petitioner then sought review by the Supreme Court of Florida, which was also denied.

ARGUMENT

A contract to repair a vessel is a maritime contract, and mandates application of federal maritime law. Alcoa Steamship Company v. Charles Farren and Company, 383 F.2d 46, 50 (5th Cir. 1967). When a state court hears a case in admiralty, as did the state court below, it is bound to follow and apply the federal maritime law. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed. 2d 505 (1959); Moragne v. State Marine Lines, Inc., 398 U.S. 275, 90 S.Ct. 1772, 26 L.Ed. 2d 339 (1970).

Under applicable precedents of this Court, exculpatory clauses in maritime contracts are void. In Bisso v. Inland Waterways Corp., 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911 (1955), this Court held an exculpatory clause that absolved a tugboat from all liability for negligence in performing its towing contract void. Following Bisso, the Eleventh Circuit Court

of Appeals in Edward Leasing Corp. v. Uhlig and Associates, 785 F.2d 877, 888-89 (11th Cir. 1986) applied the ruling and rationale of Bisso to a ship repair contract. The Eleventh Circuit Court of Appeals there held invalid an exculpatory clause with contradictory and ambiguous language and an absolute disclaimer of liability. The reasons given in both Bisso and Edward Leasing for this rule were: (1) to discourage negligence by making wrongdoers pay for damages, and (2) to prevent those in need of goods or services from being over-reached by others who have the power to drive hard bargains.

In direct conflict with the rule of Bisso and Edward Leasing, the majority opinion in the Third District Court of Appeal held the exculpatory clause contained in the contract drafted by Respondent valid. Florida law, in contradiction to the general maritime law, while frowning upon exculpatory clauses, upholds their validity in certain circumstances. Eller

and Company, Inc. v. Galapagos Line, S.A., 493 So.2d 1061, (Fla. 3rd DCA 1986). The legal principles relied upon by the state court here are those applied under Florida state law to uphold the validity of exculpatory clauses. But, when a state court hears a case in admiralty, it is bound to follow and apply the federal maritime law. Kermarac, supra; Moragne, supra, The rule of law as set forth by this Court in Bisso, supra, and followed by the Eleventh Circuit in Edward Leasing, supra, is that exculpatory clauses are void.

Thus, the state court, by relying on Florida state law announces the rule of law that directly conflicts with the precedents of this Court, all of which repeat the rule that a state court hearing a case in admiralty must apply federal maritime law.

This Court should grant certiorari in this case and entertain this case on the merits because:

I. If allowed to stand, the Third District Court of Appeal's decision will enable shipyards in Florida to avoid liability for their negligence and shoddy workmanship simply by including exculpatory language or ambiguous, convoluted or hidden exculpatory clauses in their contracts, the terms of which consumers will have no opportunity to negotiate. This will not deter negligence on the part of the repairer, but will afford a false sense of protection to the shipowner contrary to the public policy of admiralty as set forth by this Court in Bisso, supra. See Edward Leasing Corp. v. Uhlig and Associates, Inc., 785 F.2d 877, 888 (11th Cir. 1986); and

(2) If allowed to stand, the state court decision will create confusion among Florida state and federal courts. Heretofore, all state courts have followed the United States Supreme Court's mandate and applied federal maritime law in admiralty cases while in state court. By virtue of the state court's decision below, Florida courts

are now faced with conflicting precedents to the effect that state law may be applied in admiralty proceedings in state court. This will destroy the uniformity of admiralty, and encourage the vice of forum shopping.

CONCLUSION

For the foregoing reasons and citation of authority, Petitioner respectfully requests this Court grant its Petition for Ceriotrari, entertain this case on the merits, and remand with instructions quashing the appellate decision below and reinstating the judgment of the trial court.

Respectfully submitted,

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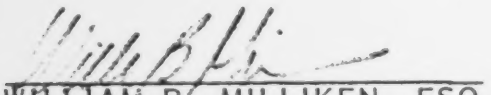
BY: _____
WILLIAM B. MILLIKEN, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, on this 31st day of March, 1988, mailed three copies of this Petition for Writ of Certiorari to G. Morton, Good, Esq., Kelley, Drye & Warren including Smathers and Thompson, Attorneys for Respondent, 2400 Miami Center, 100 Chopin Plaza, Miami, Florida 33131.



WILLIAM B. MILLIKEN, ESQ.

APPENDIX

IN THE CIRCUIT COURT OF
THE IITH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY,
FLORIDA

GENERAL JURISDICTION DIV.

CASE NO. 85-6964 (CA 25)

VIVIAN ALVAREZ,
f/u/b/o AMERICAN HOME
INSURANCE COMPANY,

Plaintiff

v.

MERRILL STEVENS DRY
DOCK COMPANY,

Defendant

_____/

AMENDED FINDINGS OF FACT AND CONCLUSION OF LAW

THIS CAUSE, having been tried before the Court on March 10 and 11, 1986, and the Court having taken testimony, evidence and argument of counsel and having considered memoranda of law of both parties, the Court hereby makes the following Findings of Facts and Conclusions of Law.

FINDINGS OF FACTS

1. Plaintiff, AMERICAN HOME INSURANCE, insured the yacht "ALISAN V", a 1980 model 40

sport fishing boat manufactured by Ocean Yacht Company. The "ALISAN V" was purchased in 1981 by SANTIAGO and VIVIAN ALVAREZ and they owned it continuously until it burned on May 1, 1983.

2. In late July, 1982, the "ALISAN V" sank at its dock. The owners of the "ALISAN V" and its insurer, American Home arranged to have Defendant, Merrill Stevens raise the yacht and tow it to their marina at Dinner Key, Florida.

3. Based on the recommendations of surveyor, Alex Milligan, competitive bids were solicited for the repairs of the yacht due to its sinking.

4. Ultimately, the contract for repair of the "ALISAN V" was awarded to Merrill Stevens.

5. Pursuant to this contract, Merril Stevens agreed to refurbish the vessel in accordance with its Invoice No. 8111 dated October 22, 1983. Item No. 3 of Merrill Stevens Invoice No. 8111 dated October 22, 1983. Item No. 3 of

Merrill Stevens Invoice No. 8111 states as follows:

> "The main engines to be removed from the vessel and disassemble complete of reduction gear - transmission units. That all parts be cleaned and water damaged parts such as rings, bearings, seals, gaskets, belts, gauge senders, filters, lubricants, regulators, relays, alternators, etc. be replaced by new ones. That electric starters as complete of solenoid units, cylinder heads and turbo units be overhauled with parts renewed as necessary. That units be reassembled, paint furnished, re-installed with alignments and securing as original and all the tested and proven in good running condition as before."

6. Item 11 of Merrill Stevens Invoice No. 8111 states as follows:

> "Replace water damaged insulations inclusive of masonite coverings and/or sheathings be removed. New supplied, installed, covered, sheathed and finished as original. Clean, prepare and pain engine space area."

The repairs itemized in No. 11 were performed by Merrill Stevens carpentry shop.

7. Merrill Stevens sub-contracted the work in item No. 3 of its Work Order 8111 to Pitts Transmission. Neither the owners nor the insurers participated in selecting the sub-contractor.

The owners were billed by Merrill Stevens for the services performed by Pitts Transmission which was paid.

8. The "ALISAN V" was equipped with Detroit Diesel 671TI engines. These engines are equipped with exhaust driven turbo-chargers whose purpose is to increase the performance and efficiency of the engine by forcing air into the intake manifold. Each Turbo consists basically of a turbine fan that is driven by the escaping exhaust gases of the engine. This turbine is connected by a shaft to the intake side of the turbo-charger. In essence, the exhaust turbine driven by the escaping gases drives the fan which forces air into the engine. This has the beneficial effect of increasing the efficiency and performance of the engine. The "ALISAN V" had turb-chargers manufactured by Air Research, Inc. The normal operating temperature of these turbo-chargers is 900° to 1200° Fahrenheit. Before the "ALISAN V" sank in July of 1982, each turbo-charger was covered with a protective

insulating blanket made of asbestos or similar material.

9. The "ALISAN V" was purchased in Puerto Rico and brought from Puerto Rico to Miami on her own bottom. The "ALISAN V " made several trips to the Bahamas with no operational problems before she sank at the dock in 1982.

10. Merrill Stevens removed the engines and turbo-chargers from the "ALISAN V" which were then trucked to Pitts Transmission. In order to disassemble the turbo-chargers the blankets had to be removed. During August of 1982, Merrill Stevens' employee, Mike Vores, at the request of Pitts Transmission, prepared a Purchase Order to a supplier of General Motors parts and engines, Johnson & Towers, Inc., requesting two sets of turbo-charger blankets for the GM 671TI engines of the "ALISAN V". Johnson and Towers never sent the turbo-charger blankets to Merrill Stevens because they were "back-ordered". This is evident on Johnson & Towers'

Invoice No. 270646.

11. The Court finds that the Plaintiff, Santiago Alvarez read and signed the Work Order and Ship Repair Contract #6427, Invoices no. 8111 and 8112. The Work and Ship Repair Contract contains the following:

1. "Contractor agrees to repair said vessel in a good and workman like manner, pursuant to the terms as outlined and the owner and/or vessel agrees to pay contractor for said work, labor and materials as hereinafter stated. In the event that specific prices are not quoted, it is understood and agreed that all work is to be performed at the contractor's usual and customary time and material charges. Other than as specifically set forth herein, contractor makes no warranties concerning its workmanship or material, either expressly or implied, including any implied warranty of merchantability or fitness for a particular purpose."

***

7. "Contractor undertakes to perform the work outlined and haul and launch vessels, provide berth, warfage, towage and other services and facilities only upon condition that it shall not be liable, directly or indirectly, in contract, tort, or otherwise, to the vessel, its owners, charterers, underwriters,

or any of their agents, servants or employees, or persons to whom they might be responsible for any personal injury or death or damage to the vessel, its cargo, equipment or movable stores or for any consequence thereof, unless such personal injury, death or peroperty damage is caused by Contractor's gross negligence or the gross negligence shall not be presumed but must be affirmatively established. In no event, including the negligence and/or the gross negligence and/or the breach of contract or CONTRACTOR, shall the CONTRACTOR'S aggregate laibility to all such parties in interest for personal injury,death or damages sustained by them, including damages, exceed the sum of $300,000 and in no event shall the CONTRACTOR be liable to any extent to the vessel, her owners, charterers and/or underwriters, for the cost of defending any claims asserted by third parties, including attorneys' fees whether such actions shall be commenced by its employees or others."

12. On approximately April 29, 1982, Santiago Alvarez took possession of his yacht from Merrill Stevens. Prior to that time representatives of Merrill Stevens and Pitts Transmission present. During at least one of these sea trials, the engine hatches were open and the vessel was stopped several times for

adjustments or repairs. None of the sea trials included a continuous engine running time in excess of one hour. With the engines running at 3/4 throttle it would have taken approximately 10 minutes for the turbo-chargers to reach their maximum operating temperature.

13. On Saturday, April 30, 1983, Santiago Alvarez took the "ALISAN V" for a short cruise in northern Biscayne Bay which did not include a continuous engine running time of more than a half an hour. During this voyage Santiago Alvarez did not notice any smell, heat or other signs of burning in the salon or engine compartment.

14. On Sunday, May 1, 1983, Santiago Alvarez and his family, along with some friends, took the "ALISAN V " to the Elliott Key anchorage in southern Biscayne Bay. The vessel was running at approxiamtely two-thirds throttle or approximately 1800 rpm. The trip from the dock to Elliot Key was approximately one to two hours. When the "ALISAN V" arrived at the anchorage, the pilot throttled down to idle speed.

15. Shortly theareafter Santiago Alvarez Jr. noted a smokey smell in the salon, which he reproted to his father. Santiago Alvarez opened the engine compartment access hatch to investigate the smell and was greated by a gray smoke spewing from the engine compartment. He immediately ordered the engines stopped and began efforts to fight the fire. He then opened one of the main engine hatches. Nearby boats brought a number of fire extinguishers which were discharged into the engine compartment to no avail.

16. John "Moby" Griffin, a marine salvor, was also at the anchorage and proceeded to assist when he noted the vessel afire. He was eventually successful in extinguishing the fire using pumps aboard his vessel. Santiago Alvarez had abandoned the "ALISAN V"before this time. Santiago Alverex spoke with "Moby" Griffin and arrange for Moby Marine to tow the "ALISAN V" to Moby Marine's dock on the Miami River were the subsequent surveys took

place.

17. After this loss, Santiago Alvarez notifed his insurance carrier who appointed marine surveyor, Dave Pascoe, to conduct a survey of the vessel. This took place over three days commencing on May 5, 1983. Subsequently, a joint survey was conducted on May 20, 1983, with marine surveyors Dave Pasco, Charlie Stephens, (appointed by the owners) and electrician Joe LaFauci of Cable Marine, also appointed by the owners.

18. As a result of the joint survey, the above surveyors concluded that the fire started because of the absence of the turbo-charger blankets on the turbo-chargers of the "ALISAN V" engines in conjunction with the proximity of flammable material in the engine room. The Court accepts their opinion as a cause of the fire.

19. The vessel's engine room was equipped with a fixed Halon fire fighting system manufacutred by Fireboy and installed by Ocean Yachts at manufacture. This system was

recommended by Fireboy as sufficient to protect a space of 200 cubic feet at 4-3/4 percent concentration, whereas the engine room in the "ALISAN V" was calculated by Plaintiff's expert, Mr. Stephens, to be in excess of 370 cubic feet. The system did not include a means of automatic shut down of the engines or of automatically warning the vessel's owner in the event of discharge of the unit. Coast Guard requirements for Halongenated systems require a minimum of 6% concentration to be effective. The fireboy unit installed was less than 1/3 of the size needed to protect the "ALISAN V", as experts for both Plaintiff and Defendant agreed. A properly designed system would include adequate size, automatic shutdown and discharge warnings, all of which were available at the time of construction of the yacht. A properly designed and installed system would have extinguished the fire, although it would not have prevented it from starting. The Court has no opinion as to what

extent the existence of a proper system would have affected the damages to the "ALISAN V", finding this to be speculative at this point.

20. The Court finds that Merrill Stevens' failure to install or to see that their sub-contractor, Pitts Transmission, installed turbo-charger blankets on the "ALISAN V" prior to delivery to the owners constituted negligence and further finds that such failure was a breach of the express agreement undertaken by Merrill Stevens in Paragraph I of their repair contract ". . .to repair the vessel in a good and workmanlike manner. . .". The failure to install these turbo-charger blankets was a proximate cause of the fire and hence Plaintiff's losses. There was no showing, however, nor was it pled, that Merrill Stevens was guilty of gross fault or gross negligence nor is there any showing that Plaintiff's negligence or fault in any manner contributed to the caues of the fire.

21. The yacht was determined to be a con-

structive total loss. American Home paid $150,000. to the owner which the Court finds to be the Fair Market Value of the vessel on the date of its destruction. Moby Marine made a salvage claim under the Sue and Labor Clause of the policy in the amount of $20,000. This was settled for $7,000 and the remains of the "ALISAN V". The Court finds that this seems to be fair and reasonable. American Home made these payments on November 14, 1983 to John Griffin and October 4, 1983 to Vivan Alvarez, which determine the date from which Plaintiff's damages began to run.

CONCLUSION OF LAW

1. This Court has jurisdiction over the parties and subject matter of this maritime claim. Venue is proper in Dade County, Florida.

2. American Home Insurance Company is subrogated to the rights of the owners of the "ALISON V" pursuant to payments made by American Home to the owners of the "ALISAN V" on the agreed value hull insurance policy held by American Home on the "ALISAN V" which was

introduced into evidence as Plaintiff's Exhibit No. I in the sum of $150,000. Pursuant to the Sue and Labor Clause of said policy, American Home also paid to their insured $20,000 for the salvage expenses referred to in paragraph 21 of the Findings of Fact herein for a total payment of $170,000.

3. American Home seeks to recover the $170,000 in damages, either in contract on the theory that Merrill Stevens breached a warranty of workmanlike performance or in tort on the theory that Merrill Stevens was negligent in repairing the "ALISAN V". It is well settled that a contract to repair a vessel is maritime in nature. Alcoa Steamship Co., Inc., et al v. Charles Ferren & Co., ("Alcoa Corsair") 383 F.2d 46, 1957 AMC 2578 (5th Cir. 1967). Cert. denied. 393 U.S. 836, 89 S.Ct. 111 (1962). Consequently, a shipowner has a maritime cause of action whether he sues in contract for a breach of warranty of workmanlike performance or in tort

for the negligent performance of a maritime contract. Alcoa Corsair, supra; Sealift v. Refinadora Costarricenfe de Petroleo, 601 F.Supp. 457 (S.D. 1984). Since Kermarec v. Compagnia Generale Transatlintic, 358 U.S. 625, 79 S.Ct. 406 (1959), it has been clear that where a case involves legal rights and liabilities which are cognizable in Admiralty, the general Admiralty law governs the case no matter what forum is chosen, including actions brought in State Court. Sealift, supra, at 463. Specifically, federal Admiralty law governs the construction of the terms of the repair contract together with the standard of performance due under the contract. Alcoa Corsair, supra, at 2583. Empacadora del Norte v. Steiner Shipyard, Inc., 954, 966 (S.D. Ala. 1979).

4. Merrill Stevens expressly agreed in their repair contract to repair the vessel in a good and workmanlike manner and specifically had the duty to reinstall turbo-charger blankets on the

"ALISAN V" before delivering it to the owners. Merrill Stevens breached their undertaking by failing to insall the turbo-charger blankets which had been back-ordered. Alcoa Corsair, supra.

5. The Court accepts Plaintiff's expert's opinion that the absence of the turbo-charger blankets was a proximate cause of the fire and hence Plaintiff's damages. There was no comparative negligence or fault in any manner on the part of the owner which contributed to the cause of the fire.

6. Merrill Stevens was also negligent in failing to install the tubo-charger blanekts which negligence was a legal cause of the burning of the "ALISAN V" under the curcumstances existing on the "ALISAN V". There was no comparative negligence by the owners which was a legal cause of the fire. There was no gross negligence or gross fault on the part of Merrill Stevens nor was any pled in Plaintiff's Complaint.

7. The inadequate fire extinguishing system designed by Fireboy and installed by the manufacturer of the "ALISAN V", Ocean Yachts, rendered the vessel unseaworthy, which was a proximate cause of the loss, although it was not a cause of the fire. Accordingly, as between Plaintiff and Merrill Stevens, the unseaworthy condition of the ship created by the fire extinguishing system has no effect on the damages recoverable by Plaintiff from Merrill Stevens. Alcoa Corsair, supra, at 2589.

8. The Court finds that paragraph 1 printed on the reverse side of Merrill Stevens repair contract is an express warranty to "repair the vessel in good and workmanlike manner". Therefore, Merrill Stevens is liable to Plaintiff on the breach of express warranty count. Insofar as the negligence count is concerned, the Court finds that the "Red Letter" clause contained in paragraph 7 of the subject repair contract is valid under maritime law and effectively exculpates

Merrill Stevens from liability on a simple negligence theory. However, the "Red Letter" clause does not absolve Merrill Stevens from liability, as here, resulting from breach of their express warranty to "repair the vessel in a good and workmanlike manner". All other affirmative defences of Merrill Stevens are rejected.

9. As a result of Merrill Stevens breach of express warranty, the yacht "ALISAN V" was declared a constructive total loss and Plaintiff has incurred damages in the following amounts. The Court further finds that American Home is entitled to pre-judgment interest at a rate of 12% per annum from the date of payment of claims as set forth in paragraph 21 of the Findings of Fact. (See Gator Marine Services Towing Company, Inc. v. V.J. Ray McDermott & Co., 651 F.2d 1096 (5th Cir. 1981):

A.	Hull Claim	$150,000.00
	Prejudgment interest Since November 14, 1983	45,000.00
	Total on Hull Claim	$195,864.00
B.	Sue and Labor (Salvage	$ 20,000.00
	Prejudgment interest since November 4, 1983	6,385.00
	Total Sue & Labor	$26,385.00
	Total Damages	$222,249.00

10. Plaintiff also claims that he is entitled to attorneys fees and costs. Attorneys fees are not recoverable by the prevailing party in admiralty actions absent statutory authority, with two exceptions, neither of which is involved here. Aleyska Pipeline Service Co. V. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612 (1975). Noritake Co. Inc. v. M/V Hellenic Champion et al, 627 F.2d 724 (5th Cir. 1980); Ocean Barge Transport Co. v. Hess Oil Virgin Island Corp. 598 F.Supp. 45 (D.St. Croix 1984); Aiple (La. 1982) Plaintiff is not entitled to an award of attorneys fees on its breach of contract claim, whether termed breach of warranty of workman-

like performance or otherwise, since no liability has been imposed upon Plaintiff for which he is seeking indemnity. The Court is aware of the apparent holdings in the 5th Circuit cases of Todd v. Turbine Service, Inc., supra, and Todd Shipyards Corp. v. Auto Transportation, S.A. 763 F.2d 745 (5th Cir. 1985) but expressly declines from applying them to a situation as here, where indemnity is not being sought. Smith & Kelly Co. v. S/S Concordia Tadj, 718 F.2d 1022 (11th Cir. 1983). The Court reserves jurisdiction to award taxable costs upon appropriate motion.

II. Plaintiff shall submit a Final Judgment in accordance with these Findings of Fact and Conclusions of Law within 5 days.

DONE AND ORDERED in Chambers this 18th day of June, 1986 at Miami, Dade County, Florida.

/s/ PHILLIP W. KNIGHT
Circuit Court Judge

Copies to: Domingo Rodriguez, Esq.
Debra L. Brady, Esq.
Debra Altizer, Esq.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA - THIRD DISTRICT
January Term, 1987

CASE NO. 86-1732

MERRILL STEVENS DRY DOCK
COMPANY,

Appellant

v.

VIVIAN ALVAREZ, f/u/b/o
AMERICAN HOME INSURANCE
COMAPNY,

Appellee

_____/

Opinion filed June 23, 1987

An Appeal from the Circuit Court for Dade County, Phillip W. Knight, Judge.

Smathers & Thompson and Debra L. Brady and G. Morton Good, for appeallant

Hayden and Milliken and Domingo C. Rodriguez, for appellee

Before BASKIN and DANIEL S. PEARSON and FERGUSON, JJ.

PER CURIAM

This is an appeal from a final judgment

in favor of the appellee,American Home Insurance Company, for $222,249 the amount determined by the trial court, sitting without a jury, to be the damages suffered by the appellee when a yacht owned by Alverez, American Home's subrogor[1] was totally destroyed by fire. Merrill Stevens Dry Dock Company urges that an exculpatory clause in the repair contract relieved it from responsibility for damages to other parts of the vessel or the vessel as whole, caused by its negligent failure to properly repair a certain part of the vessel. We agree and reverse with directions to enter judgment for Merrill Stevens.[2]

There is no dispute that the negligent failure of the defendant, Merrill Stevens Dry Dock Company, to install or to see to it that its subcontractor installed turbo-charger blankets on the plaintiff's yacht was a breach of its express undertaking "to repair the vessel in a good and

workmanlike manner" and was the proximate cause of a fire resulting in the total loss of the vessel. There is also no dispute that it was neither pleaded nor proved that Merrill Stevens' omission amounted to gross megligence.

Initially, the trial court, in entering judgment for Merrill Stevens as to the loss of the vessel claim, concluded that Clause contract

> clearly and unequivocally expresses the intent that Merrill Stevens shall have no liability for any damages or losses sustained, whether in tort or contract unless and until it has been establisehd that their conduct amounted to gross engligence. Such clasues under the maritime law, known as "Red Letter" clauses have been held to be valid and binding. Todd Shipyard Corp. v. Turbine Service, Inc., 674 F.2d 401 (5th Cir. 1982); Morton v. Zidell Explorations, Inc., 695 F.2d 347 (9th Cir. 1982); Ortiz v. ETPM U.S.A., Inc., 553 F.Supp.549 (S.D. Tex. 1982); Noruna IV, AMC 967 (D.Mass. 1969). Clause 7 was under all the circumstances surrounding these repairs binding on the parties, valid and enforceable."

On rehearing, the trial court reversed itself, concluding that the "Red Letter" clause did not "absolve Merrill Stevens from liability. . .

resulting from breach of their express warranty to 'repair the vessel in a good and workmanlike manner.'"

We are of the view that the trial court was right in the first place: Merrill Stevens' undertaking to "repair the vessel in a good and workmanlike manner" made it responsible to correct defective repairs; the exculpatory clause relieved Merrill Stevens--unless grossly negligent--from responsibility for damages to other parts of the vessel caused by the defective repairs. This is simply an unambiguous arm's length transaction between parties of like bargaining power who were well able to allocate who was to bear the responsibility for insuring against what loss. Accordingly, the judgment under review is reversed, and the cause is remanded to the trial court with directions to enter judgment for Merrill Stevens. The order denying American Home's motion for attorneys fees is affirmed.

Affirmed in part; reversed in part, and remanded with directions.

DANIEL S. PEARSON and FERGUSON JJ., concur.

BASKIN, Judge (dissenting).

Initially, the trial court construed the parties' contract as absolving Merrill Stevens Dry Dock, Inc. [Merrill Stevens] of liability unless Merrill Stevens was proved grossly negligent in performing yacht repairs. Upon reconsideration, however, the court declared Merrill Stevens liable for the loss of the yacht, ruling that it had breached its express warranty. The majority reverses the trial court's determination upon a holding that Merrill Stevens incurred no liability unless it was grossly negligent in the performance of its contract. To reach that conclusion the majority relies on a portion of the challenged clause, but is silent as to the significance of the remainder of the clause. The majority's failure to give effect to the entire clause forms the basis of my dissent.

The operative clause states:

> CONTRACTOR undertakes to perform the work outlined and haul and launch vessels, provide berth, wharfage, towage, and other services and facilities only upon the condition that it shall not be liable, directly or indirectly, in contract, tort, or otherwise, to the vesel, its owners, charterers, underwriters, or any of their agents, servants, or employees, or persons to whom they might be responsible for any personal injury or death, or damge to the vessel, its cargo, equipment or movable stores or for any consequence thereof, unless such personal injury, death, or property damage, is caused by CONTRACTOR'S gross negligence or the gross negligence of any of its employees, which gross negligence shall not be presumed but must be affirmatively established. In no event, including the negligence and/or the gross negligence and/or the breach of contract of CONTRACTOR, shall the CONTTRACTOR'S aggregate liability to all such parties in interest for personal injury, death or damage sustained by them, including damages for delay of the vessel, or any other type of damage, exceed the sum of $300,000.00, and in no event shall the CONTRACTOR be liable to any extent to the vessel, her owners, charterers and/or underwriters, for the cost of defencing any claims asserted by third parties, including attorney's fees, whether such actions shall be commenced by its employees or others.

Reading the clause in its entirety, I conclude that Merrill Stevens is laible for its conduct under the terms of the contract. Although the first portion of the clause purports to impose liability on Merrill Stevens only if it is found

grossly negligent, The second section renders Merrill Stevens liabile up to the sum of $300,000 for "negligence and/or . . .gross negligence and/or ...breach of contract . . . ." The parties obviously envisioned circumstances where Merrill Stevens could be liable under any of three theories; negligence, gross negligence, or breach of contract. The trial court, having determined that Merrill Stevens breached its express warranty to repair the yacht in a "good and workmanlike manner," correctly imposed liability on Merrill Stevens and, following firmly established principles of law, see Alcoa Steamship Co. V. Charles Ferran & Co., 383 F.2d 46 (5th Cir. 1967), cert. denied, 393 U.S. 836, 89 S.Ct. 111, 21 L.Ed. 2d 107 (1968) awarded damages under the $300,000 limitation. The majority approves the trial court's finding, but refuses to impose liability, apparently because the breach stems from a contractual violation rather than from gross negligence.

I find no basis for the majority's reweighing of the trial court's findings of fact, its failure to

consider the second portion of the contested clause, or its holding that Merrill Stevens' breach of its express warranty does not constitute grounds for assessing liability. I would enforce the contract and hold Merrill Stevens liable up to the $300,000 limit intended by the parties. I agree, however, that American Home Insurance Company is not entitled to attorney's fees.

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1. American Home, as the vessel's insurer, paid Alvarez $180,000 for the loss.

2. American Home cross-appeals from the trial court's order denying it attorney's fees. We affirm that order without further discussion.

3. Clause 7 of the contract provides:

> "CONTACTOR undertakes to perform the work outlined and haul and launch vessels, provide berth, wharfage, towage, and other services and facilities only upon the condition that it shall not be liable, directly or indirectly, in contract, tort, or otehrwise, to the vesel, its owners, charterers, underwriters, or any of their agents, servants, or employees, or persons to whom they might be responsible for any personal injury or death, or damge to the vessel, its cargo, equipment or movable stores or for any consequence thereof, unless such personal injury, death, or property damage, is caused by CONTRACTOR'S gross negligence or the gross negligence of any of its employees,

which gross negligence shall not be presumed but must be affirmatively established. In no event, including the negligence and/or the gross negligence and/or the breach of contract of CONTRACTOR, shall the CONTRACTOR'S aggregate liability to all such parties in interest for personal injury, death or damage sustained by them, including damages for delay of the vessel, or any other type of damage, exceed the sum of $300,000.00, and in no event shall the CONTRACTOR be liable to any extent to the vessel, her owners, charterers and/or underwriters, for the cost of defending any claims asserted by third parties, including attorney's fees, whether such actions shall be commenced by its employees or others."

IN THE DISTRICT COURT OF
APPEAL OF FLORIDA

THIRD DISTRICT

July Term, A.D. 1987
Monday, August 31, 1987

MERRILL STEVENS DRY
DOCK COMPANY,

Appellant

v. CASE NO. 86-1732

VIVIAN ALVAREZ, f/u/b/o
AMERICAN HOME INSURANCE
COMPANY,

Appellee
_____/

Upon consideration, appellee's motion for rehearing and rehearing en banc is hereby denied.

(Baskin, J. dissents.)

A true copy

Attest:
LOUIS J. SPALLONE
Clerk District Court of
Appeal, Third District

cc: Debra L. Brady
Domingo C. Rodriguez

SUPREME COURT OF FLORIDA
Tuesday, January 5, 1988

CASE NO. 71245
District Court of Appeal, Third
District No. 86-1732

VIVIAN ALVAREZ, f/u/b/o
AMERICAN HOME INSURANCE
COMPANY,

Petitioner,

v.

MERRILL STEVENS DRY DOCK
COMPANY,

Respondent

_____/

This cause having heretofore been submitted to Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V., Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be enter-

tained by the Court. See Fla. R. App. P. 9 330 (d).

OVERTON, Acting C.J. EHRLICH, SHAW BERKETT and GRIMES, JJ., concur.

A true Copy

TEST:

Sid J. White,
Clerk Supreme Court

cc: Hon. Louis J. Spallone, Clerk
Hon: Richard P. Brinker, Clerk
Hon. Phillip W. Knight, Judge

Domingo C. Rodriguez, Esq.
Debra L. Brady, Esq.
G. Morton Good, Esq.